the wife has had no opportunity of challenging. The two relevant documents read as follows:—

"27th February 1978.

The Mufti of the Federal Territory,
Kuala Lumpur.

Sir,

We act for Dr. Umar Viswalingam bin Abdullah, formerly known as Dr. Uma Viswalingam.

Our Client, then a Hindu, underwent a civil marriage on 30th March, 1955, in Sri Lanka (Ceylon) with one Sarojini d/o Sevaprakasam an Anglican, i.e. a follower of a Christian denomination which came into existence after the birth of Prophet Mohammed.

Our Client's wife has been living in England since 1974 and has remained an Anglican.

We have been instructed to obtain a Fatwa in respect of the aforesaid marriage, particularly in regard to the fact that our Client's wife is still an Anglican.
Thank you.

Yours faithfully,
DR. YAACOB."

The reply to that letter:

"6th March 1978

Dr. Yaacob & Ismail,
4028B, 4th Floor,
President House (Regent Hotel),
Julan Sultan Ismail,
KUALA LUMPUR.

Sir,

Re: *Marriage of Dr. Umar Viswalingam bin Abdullah and Sarojini d/o Sevaprakasam.*

With reference to your letter dated 27th February 1978 in respect of the above, this is to inform you that pursuant to Muslim Law in force in the Federal Territory, the marriage in question no longer subsists since Dr. Umar has embraced Islam and his wife has not followed suit.

2. This ruling/Fatwa is made in accordance with the facts referred to in your letter aforesaid.

Yours faithfully,
Sgd.
(DATUK SHEIKH A. MOHSEIN B.H. SALLEH)
Mufti of the Federal Territory."

For these reasons we are not prepared to recognise that the wife in this case had ceased to be the wife of the husband at the date when she presented her petition to this court. This appeal must accordingly be dismissed.

*Appeal dismissed with costs.*

Solicitors: *Kingsford Dorman; Mylles & Co.*

---

# MALAYSIAN REPORTS

## SINGMA SAWMILL CO. SDN. BHD. v. ASIAN HOLDINGS (INDUSTRIALISED BUILDINGS) SDN. BHD.

**[F.C. (Raja Azlan Shah Ag. C.J. (Malaya) Wan Suleiman & Salleh Abas F.JJ.) February 5 & 24 1979]**

**[Johore Bahru — Federal Court Civil Appeals Nos. 121 & 122 of 1978]**

*Landlord and Tenant — Distress for rent — Agricultural land let for industrial purposes — Illegal consideration — Whether machines fixtures and therefore not distrainable — Whether tenant estopped from denying landlord's title — Contracts Act, 1950, ss. 24, 66 & 116.*

*Contract — Illegal contract — Whether compensation payable for advantage obtained — Contracts Act, 1950, ss. 24 & 66.*

*Land Law — Fixtures — Whether machinery used in factory fixtures — Distress Ordinance, 1951.*

In this case the appellants had obtained warrants of distress against the respondents for arrears of rent. The respondents applied to discharge the warrants on the grounds (a) that the use of the land was illegal and therefore the contract of tenancy was void or voidable; and (b) that the machines are fixtures and therefore cannot be distrained. The land was agricultural land and the applicants had been unsuccessful in their application to change the category of land use from agriculture to industry. The learned Judicial Commissioner allowed the respondent's applications. He held that the appellants were guilty of giving an illegal consideration to the said agreement and as such the contract was void under section 24 of the Contracts Act, 1950. He further held that the machines which were attached to the land by bolts and screws were fixtures. The appellants appealed.

**Held:** the tenancy agreement in this case was void and unenforceable. The appellants were aware of the illegality when they entered into the agreement and therefore section 66 of the Contracts Act, 1950, could not assist them.

*Cases referred to:-*

(1) *Goh Chong Hin* v. *Consolidated Malay Rubber Estate Ltd.* (1924) 5 F.M.S.L.R. 86.

(2) *Crossley Brothers Ltd.* v. *Lee* [1908] 1 K.B. 86.

(3) *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156.

(4) *Fatimah* v. *Moideen Kutty* [1969] 1 M.L.J. 72.

(5) *Kuju Collieries* v. *Jharkhand Mines* A.I.R. 1974 S.C. 1892.

(6) *Scott* v. *Brown, Doering, McNab and Co.* [1892] 2 Q.B. 724, 728.

(7) *Gas Light & Coke Co.* v. *Turner* (1840) 133 E.R. 127.

(8) *Alexander* v. *Rayson* [1936] 1 K.B. 169.

(9) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] A.C. 294; [1962] M.L.J. 143.

(10) *Arumugam* v. *Somasundram* [1933-34] F.M.S.L.R. 322.

(11) *Moti Chand* v. *Ikram-Ullah* A.I.R. 1916 P.C. 59.

(12) *Edward Ramia Ltd.* v. *African Woods Ltd.* [1960] 1 W.L.R. 86.

(13) *La Banque Jacques-Cartier* v. *La Banqe Depargne De La Cite Et Du District De Montreal* (1887) 13 A.C. 111, 118.

HIGH COURT.

*G.S. Nizar* for the applicants.

*E. Gunaratnam* for the respondents.

*Cur. Adv. Vult.*

**Anuar J.C.:** This is an application by the respondents, Asian Holdings (Industrialised Buildings) Sdn. Bhd. by way of Notice of Motion for an Order that: —

(1) The Warrant of Distress issued herein on the 30th day of January, 1977 and/or the execution thereof may be discharged and this suit may be dismissed on the grounds set out in the affidavits filed herein in support of this application.

*Alternatively:—*

(2) The applicants by their servants or agents including the Court Bailiff and all persons holding through or under them may be restrained and an injunction may be granted restraining them from proceeding with the execution of the Warrant of Distress issued herein on the 30th day of January, 1977 by way of sale by public auction or otherwise.

*In the further alternative:—*

(3) The Warrant of Distress issued herein on the 30th day of January, 1977 and/or the execution thereof may be suspended pending the final determination of the issues set out in the affidavits filed herein in support of this application.

*In any event*

(4) This Distress Suit and all proceedings herein may be stayed pending the final disposal of Johore Bahru High Court Civil Suit No. 729 of 1977 between tne respondents herein as the plaintiffs and the applicants herein as the defendants.

(5) Such further or other reliefs or directions as to this Honourable Court may seem just.

(6) Costs of and incidental to this suit and including the costs of this application may be taxed as between party and party on the higher scale and paid by the applicants to the respondents.

It is necessary for me to relate the events which led to the present motion. Singma Sawmill Co. Sdn. Bhd. are the applicants in Distress Suit No. 1/77 and 6/77. They applied for and obtained Warrants of Distress to be issued against the respondents Asian Holdings (Industrialised Buildings) Sdn. Bhd. for arrears of rent. As a result the Bailiff of the High Court Johor Bahru executed the said Warrants of Distress on February 8, 1977 and June 22, 1977 respectively.

An objection was filed by Malayan Co-operative Agencies Society Ltd. claiming ownership of the properties seized. The objectors asked for the properties to be released.

Interpleader summons by the Sheriff was then issued on February 28, 1977. The matter was disposed of by the judge on August 29, 1977.* The objection was dismissed. However the objectors appealed against the decision and the matter is now pending in the Federal Court.

The respondents then took out a notice of motion on November 26, 1977 to move the court for an order as prayed above.

The grounds for the application by the respondents are contained in the affidavits of Michel C. Soelle dated November 27, 1977 and January 12, 1978.

The applicants' affidavit in reply is affirmed by Yap Chuan Seng @ Yap Seng Hock, a director of the applicants' company dated December 27, 1977.

There are several grounds on which the respondents relied. But to my mind the issues can be narrowed down to two grounds. One is that because the use of the land is illegal therefore the contract of tenancy is void or voidable. Secondly that the machines are fixtures and therefore cannot be distrained. Other grounds I think are without merits.

It is not disputed that the land upon which the respondents are tenants is an agricultural land. There is a condition imposed on the use of the land. The condition is that the land is to be planted with rubber and pineapples only. The use of the land for other purposes would, to my mind, be a breach of the said conditions. A breach of conditions arises under section 125 of the National Land Code as soon, and continues so long, as the condition is not complied with and the land would be liable to a forfeiture under section 127 of the same Code.

The applicants have let the land together with a factory building on it to the respondents solely for the purposes of operating a factory. For this purpose the respondents have erected machinery on the land. It is clear that the land is being let out in breach of the conditions under section 120 of the National Land Code. In my opinion the use of the land is therefore unlawful and the letting out of the land for the unlawful purpose would be illegal.

The tenancy agreement dated March 16, 1975 is an agreement for the landlord to let the tenant take a portion of the said land together with a "factory building" erected thereon for a term of years. By clause 8(a) of the agreement it is agreed that the tenant would use the premises solely for purposes of operating a factory. At the time of signing the agreement apparently the landlord did not inform or disclose to the tenant that the land was an agricultural land. The tenant came to know of the irregularities only after the officers from the Industrial Development Department of the State of Johore came to the site and told the tenant that they were operating illegally. This is evidenced by the respondents' letter dated June 28, 1976 to the applicants informing them of the discovery of the irregularities (Bundle marked B page 17 referred to in the affidavit of Michel C. Soelle dated January 12, 1977). The applicants did not deny the allegations contained that the applicants had misrepresented the facts to the respondents when the tenancy agreement was signed. Had the respondents known that the land was not meant for industry I am sure they would not have agreed to enter into the tenancy agreement. It follow therefore that applicants are guilty of giving an illegal consideration to the agreement. Section 24(6) of the Contracts Act, 1950 provides that the consideration of an agreement is unlawful if it is of such a nature that, if permitted, it would defeat any law. By allowing the land to be used for industrial purposes would defeat the law in that it would defeat the conditions imposed on the land by the State Authority. Since the consideration for the contract is illegal the contract itself would be void or voidable. A contract cannot be enforced if

* [1979] 1 M.L.J. 41.

the promise by one party is illegal. In other words a void contract cannot be enforced.

For the above reasons the respondents would I think be entitled to rescind the contract, which they did by the letter dated June 28, 1976 (Bundle marked "B" at page 17 referred to in the affidavit of Michel C. Soelle dated November 27, 1977).

The other issue raised by the respondents is the question of fixtures. I have no doubt in my mind that the machines are fixtures. The photographs shown in the Bundles marked "B" referred to in the affidavit of Michel C. Soelle sworn on January 12, 1978 clearly show that they are attached to the land by screws and bolts. The word fixtures has no definite meaning. However the English law of fixtures applies. This is decided in *Goh Chong Hin* v. *Consolidated Malay Rubber Estate Ltd.*[1] In this case it was held that machinery attached to the soil by bolts and nuts is *prima facie* "land". In *Crossley Brothers Ltd.* v. *Lee*[2] the court held that an engine fastened to a concrete floor was a fixture. In the present case the machines are fixed to concrete floor with screws and bolts and therefore they are sufficiently annexed to the land to have become a fixture. A fixture clearly is not distrainable. The Warrant of Distress is issued under section 10 of the Distress Ordinance, 1951. The action only applies to movable property. The applicants therefore cannot have the machines seized under a warrant of distress because as I have said they are fixtures and not movable properties.

In the circumstances I would allow the respondents' motion and order that the Warrant of Distress No. 1/77 and 6/77 issued on January 30, 1977 and June 20, 1977 respectively be discharged and the suit dismissed.

*From the above decision the applicants appealed to the Federal Court.*

FEDERAL COURT.

*Ong Ban Chai* for the appellants.

*V.K. Palasuntharam* (*Miss Thavamani Subramaniam* with him) for the respondents.

*Cur. Adv. Vult.*

**Raja Azlan Shah Ag. C.J. (Malaya)** (delivering the judgment of the Court): Singma Sawmill Co. Sdn. Bhd., the appellants to this appeal, are the applicants in Distress Suits No. 1/77 and No. 6/77. They applied for and obtained Warrants of Distress to be issued against Asian Holdings (Industrialised Buildings) Sdn. Bhd., the respondents, for arrears of rent. As a result the Bailiff of the High Court, Johore Bahru executed Warrants of Distress on February 8, 1977 and June 22, 1977, respectively.

On November 26, 1977 the respondents applied by way of motion to discharge the Warrants of Distress and to dismiss the actions on two principal grounds, namely, the use of the land is illegal, therefore the contract of tenancy is void or voidable, and, the machines are fixtures and therefore cannot be distrained.

The learned Judicial Commissioner allowed the respondents' applications. He held that the appellants are guilty of giving an illegal consideration to the said agreement, and as such, the contract is void under section 24 of the Contracts Act, 1950. We would at the outset express our respectful concurrence with that view. We think it is borne out by the various authorities to which we will refer. Section 24 enacts thus:

"The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

He further held that the machines which are attached to the land by bolts and screws are fixtures within the meaning of the Distress Ordinance, 1951 and that being so, cannot be distrained.

The facts of the case are simple and straightforward. On March 18, 1975 the appellants let to the respondents a portion of their land together with a factory building erected thereon for 3 years at a monthly rental of $3,000 payable in advance, "solely for the purpose of operating a factory". The respondents are carrying on the industry of prefabricated houses and for that purpose they have erected in the factory heavy machinery which are affixed to concrete beds by means of screws and bolts and as such are sufficient in law to become fixtures. That is well illustrated by the case of *Crossley Brothers Ltd.* v. *Lee.*[2] They ceased to pay rent from June 1976 after they were warned by a representative of the Industrial Development Department of the Government of the State of Johore that they were operating the factory illegally and in breach of the express condition. They told the appellants of their discovery and requested them to rectify the situation but the latter took no heed and instead insisted the former to continue to pay rent. The appellants did not deny that they did not inform the respondents of the express condition when they signed the agreement but they averred that the latter had affirmed, alternatively had executed it. It was argued that there was acquiescence and waiver.

It is in such circumstances that the respondents claim that the relationship of landlord and tenant never existed and accordingly the appellants have no right to claim any rent from them.

The crisp issue for decision in this appeal is one of illegality. If the tenancy agreement is declared void *ab initio*, it follows that there is no right to recover rent under it and there can be no question of distress for rent. We will therefore confine ourselves to that issue.

It is not disputed that the said land is agricultural land (see section 52(1) of the National Land Code)

and subject to an express condition that it is to be used for the cultivation of pineapple and rubber, and that being so, the condition runs with the land and binds the appellants and every person having or claiming any interest in it (section 104) unless there is a change in the category of land use. In 1974 the appellants were not successful in their application to change the category of land use from agriculture to industry. On July 25, 1976, the Collector exercised the powers conferred on him under section 128 and issued a Form 7A notice on the appellants requiring them to remedy the breach and demolish the factory. As the appellants failed to comply with the said notice another notice in Form 7B under section 129 was issued. We have not been told whether the statutory inquiry under subsection (4) has already been held or is going to be held.

A sustained argument on behalf of the appellants was addressed to us to the effect that the tenancy agreement is not illegal in that it does not contravene any law. What has happened, it was argued, is connected with land use which is a matter between the appellants and the State Authority, and nothing to do with the respondents as their tenant. It was further said that assuming there is a breach of the express condition, it is for the State Authority to take necessary action to forfeit the said land and when that happens, the respondents will have the right to terminate the said agreement.

Two propositions were advanced to support the appellants' case. First, it was submitted that the respondents are estopped from denying the appellants' title. Section 116 of the Evidence Act, 1950 (Act 56) was relied upon to justify their case and the decision in *Ban Seng* v. *Yap Pek Soo*[3] was cited as authority for such a proposition. The second proposition is based on the effect of section 66 of the Contracts Act, 1950 (Act 136) which embodies a well-known rule of equity that a person who has received any advantage under an agreement discovered to be void or under a contract which becomes void, must make compensation for it.

The respondents' case was argued in this way. The tenancy agreement is *void ab initio* in that it contravenes section 24(b) of the Contracts Act. That being so, there is no contract of tenancy in existence and there can be no question of the continuance of such tenancy so as to attract the provisions of section 116 of the Evidence Act. Since the contract is *void ab initio* and unenforceable, section 66 of the Contracts Act does not apply.

The case of *Ban Seng* v. *Yap Pek Soo, supra,* is a good starting point. It is authority for the proposition that in an action to recover arrears of rent the tenant in possession is estopped from denying his landlord's title. In that case the landlord continued to let the premises built on T.O.L. land issued to his brother after the licence had expired.

That case is in conflict with the decision of this court in *Fatimah* v. *Moideen Kutty*[4] which held that notwithstanding the doctrine of estoppel a tenant may plead that the title of the landlord has come to an end. In that case the personal representative of a deceased temporary licence holder was seeking to enforce a warrant of distress to recover arrears of rent alleged to be payable by a tenant of the deceased in respect of a period after his death and it was held that whatever rights the deceased might have had over the land terminated on his death, and the personal representative did not at the material time have any right to distrain. That reasoning is in our view consistent with the rights of a temporary occupation licence holder which are personal in nature. Such rights cease on the death of the licence holder or by effluxion of time.

In our view, the relationship of landlord and tenant can be created only by a contract, valid according to the law subsisting at the time of its execution or can be created or continued by operation of law. Now section 116 of the Evidence Act enacts that no tenant of immovable property shall, during the continuance of the tenancy be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. The words "during the continuance of the tenancy" are important and make it clear that where there is no legal tenancy, the provisions of the section are not applicable. That being so, where the contract of tenancy has come to an end by effluxion of time, there is no legal contract of tenancy and therefore there can be no question of the continuance of such tenancy. The tenant in consequence can later challenge the status of the landlord, and he cannot be deemed to be estopped from denying that the title of the landlord has come to an end. We are of the view that the decision in *Ban Seng* v. *Yap Pek Soo, supra,* is now no longer good law.

We now proceed to consider whether section 66 of the Contracts Act applies. The principle is well illustrated by the case of *Kuju Collieries* v. *Jharkhand Mines.*[5] In that case a mining lease was granted to the plaintiffs who knew that it was contrary to the Mines and Minerals Act, 1948. They were already in the mining business and had the advantage of consulting their lawyers and solicitors. So there is no occasion for them to have been under any kind of ignorance of the law. They should have been aware of the illegality of the agreement when they entered into it. It was held that they were not entitled to claim refund of the money paid under the lease as the payment was not made lawfully. The facts showed that the contract was *void ab initio* and that it was not a case to which section 65 of the Indian Contract Act (section 66 of our Contracts Act) applied. The contract did not become void subsequently. Nor could it be said that the agreement was discovered to be void after it was entered into.

A principle gleaned from that case is to the effect that a contract which is not in accordance with statutory requirements is no contract at all, and therefore cannot be said to have been discovered to be void under section 66 of the Contracts Act. Nor is it a case of the contract becoming void due to subsequent happenings. The section therefore enacts in statutory form that a contract that is illegal in itself is void and unenforceable by either party. It is contaminated by *turpis causa* and that rule has long been established

that *ex turpis causa oritur non actio* — no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands. In the words of Lindley L.J. in *Scott* v. *Brown, Doering, McNab & Co.*[6]:

"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."

Thus in the case of a lease known to the lessor to be illegal, he cannot sue for the recovery of rent, since to substantiate his claim he must necessarily rely upon the illegal transaction. In *Gas Light & Coke Co.* v. *Turner*[7] the plaintiffs had demised certain premises to the defendant to be used by him for an unlawful purpose. It was held that the plaintiffs were not entitled to sue the defendant upon the covenant for rent in the lease.

A landlord who lets premises with guilty intent cannot sue for rent. In *Alexander* v. *Rayson,*[9] the plaintiffs let a service flat to the defendant for £1,200. The contract was drawn up in two documents. In the first, the defendant agreed to pay £450 for the flat and certain services; in the second, she agreed to pay £750 for the same services, plus the use of a refrigerator. The plaintiff's object in splitting up the contract in that way was to defraud the rating authorities by showing them the first document only. It was held that the contract was illegal and that the plaintiff was not entitled to seek the assistance of the court to enforce the lease or the agreement. It was the formulation of the transaction in a particular way by means of the lease and agreement, and not the subject matter of the transaction, of which an illegal use was to be made.

The same principle was applied where a father transferred part of his rubber estate to his son, intending to keep full control of it, with the sole object of getting a larger production quota: see *Palaniappa Chettiar* v. *Arunasalam Chettiar.*[9]

In *Scott* v. *Brown, Doering, McNab & Co.* (above) it was held that a contract to "rig the market" by offering inflated prices for shares in a particular company was illegal as it was an indictable conspiracy and that the purchase money could not be recovered. It will be observed that there was no intention on the part of the plaintiffs to use the shares in an unlawful way. The intention was merely to make use of the existence of the share contract in order to defraud the public by inducing them to believe that it recorded a genuine transaction. It was the transaction of purchase on the market at a particular price and not the thing purchased, of which an illegal use was to be made.

We would like to refer to three cases which we think are also relevant. In *Arumugam* v. *Somasundram,*[10] the driver and the owner of a private motor car used it for hire purposes contravening section 44 of the Motor Vehicles Enactment, 1928. It was held that both the parties were *in pari delicto* and that the driver could not claim any wages from the owner. There was nothing illegal in agreeing to drive a car for hire, but if the object of the agreement was to drive an unlicensed car for hire, then the agreement was unlawful as being forbidden by law, or of such a nature that if permitted it would defeat the provisions of the law.

In *Moti Chand* v. *Ikram-Ullah,*[11] it was held that an agreement by a vendor to relinquish ex-proprietory rights in Sir lands was void and unenforceable as it would if permitted, defeat the policy of the Agra Tenancy Act, which is to secure and preserve such rights. The policy of the Act was not to be defeated by any ingenuous devices, arrangements or agreement of relinquishments by a vendor of such lands, or for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands.

In *Edward Ramia Ltd.* v. *African Woods Ltd.*[12] it was held that any person desiring to obtain a concession in respect of land in Ashanti must comply with the essential and imperative requirements of the Concessions Ordinance of the Gold Coast which was designed to protect the grantor in the public interest and no waiver was possible of any of the requirements prescribed in the Ordinance. Thus, where the appellant company which had applied for and been granted a concession by the Stool of Bekwai relating to timber rights in land in Ashanti, had admittedly failed to comply with the provisions of the Ordinance, the concession was invalid and unenforceable. To accede to waiver of any of the requirements of the Ordinance would be entirely to ignore the intention of the legislature for the public good and to defeat one of the main purposes of the Concessions Ordinance.

That brings us to real crux of this appeal. Is the tenancy agreement void and unenforceable? Now, in the cases to which we have referred, there was an intention to use the subject-matter of the agreement for an unlawful purpose, and also an intention to make use of the lease or agreement for an unlawful purpose. The principles applicable to both cases are the same. In such cases any party to the agreement who has the unlawful intention is precluded from suing upon it. *Ex turpis causa non oritur actio.* The action does not lie; not for the sake of the defendant but because the court will not lend its assistance to such a plaintiff. It will look behind such cosmetic arrangements to see the real intention.

In the present case, the breach of the express condition is wilful, if not, contumacious. There is a clear intention on the part of the appellants to use the subject-matter of the agreement i.e. the land on which the factory was created, for an unlawful purpose. The object of the express condition is that the land must be cultivated with rubber and pineapple; the category of land use is agriculture, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use. The appellants are deemed to have been aware of the illegality of the

agreement when they entered it and therefore section 66 of the Contracts Act cannot assist them.

Appellants' counsel further contended that respondents had acquiesced in the agreement. We think that this is too crude an argument. It overlooks the fact that the respondents were not aware of the express condition until they were warned by the Government Industrial Development Department of the breach. If a man acquiesces to something of which he knows nothing, it is of no real evidential value. "Acquiescence must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in and adoption of the transaction." (See *La Banque Jacques-Cartier* v. *La Banque Depargne De La Cite Et Du District De Montreal*[12]).

It is unnecessary in the circumstances for us to deal with the respondents' case based on fraudulent misrepresentation and so we say nothing about that.

For these reasons, we are of the opinion that both the appeals ought to be dismissed with costs. The reasons which we have given do not differ in substance from the ground that commended itself to the learned Judicial Commissioner.

*Appeals dismissed.*

Solicitors: *Ong Ban Chai & Razak; Gunaretnam & Co.*

---

## OOI SOON ENG v. NG KEE LIN

**[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) December 5, 1978 & April 21, 1979]**

**[Penang — Federal Court Civil Appeal No. 89 of 1978]**

*Practice and Procedure — Consent order — Application to vary consent order — Partnership accounts — Appeal Record — Cross-appeal relating to costs only — R.S.C. 1957, O. 28 r. 11 & O. 37 r. 1G — Courts of Judicature Act, 1964, s. 68(1).*

The respondent in this case had taken an action for the partnership between him and the appellant to be dissolved and for various accounts and enquiries. An order for the taking of accounts was made by the learned trial judge. The appellant applied for variation of the order and the appellant was allowed to make an application for that purpose. At the hearing of this application the learned judge made an order that the appellant do furnish accounts of the Eng Thye Company which belonged to the partnership. The appellant appealed and argued that the accounts should be only from January 1, 1974. The appeal record contained a number of documents and material not relevant to the appeal. The respondent lodged a cross-appeal against the order that each party should bear its own costs.

**Held:** (1) in view of the fact that the accounts of the Eng Thye Company for the period January 1, 1962 to December 31 1973 had been settled, the proper order should have been production and inspection of the accounts from January 1, 1974;

(2) in view of the irrelevant matter included in the appeal record, the cost of preparing the record should be trimmed by a half;

(3) as no leave had been obtained for cross-appeal from the order relating to costs, the cross-appeal should be dismissed.

*Cases referred to:-*

(1) *Nam Thian Siew* v. *Chuah Wai Lam* [1959] M.L.J. 126.
(2) *Amar Singh* v. *Chin Kiew* [1960] M.L.J. 77.
(3) *Lyus* v. *Stepney Borough Council* [1941] 1 K.B. 134.
(4) *Huddersfield Banking Co.* v. *Hg. Lister and Sons* [1895] 2 Ch. 273.
(5) *Wilding* v. *Sanderson* [1897] 2 Ch. 534.
(6) *Kelsey* v. *Doune* [1912] 1 K.B. 483.
(7) *Dawson* v. *Hill* [1934] W.N. 219.
(8) *Mullins* v. *Howell* (1879) 11 Ch. D. 763.
(9) *B (GC)* v. *B (BA)* [1970] 1 All E.R. 913, 916.
(10) *Lim Siew Neo (f)* v. *Pang Keah Swee* [1958] M.L.J. 111.

FEDERAL COURT.

*T.R. Hepworth* (*K. Balasundaram* with him) for the appellant.

*Tan Phock Kin* for the respondent.

*Cur. Adv. Vult.*

**Chang Min Tat F.J.** (delivering the judgment of the Court): The two protagonists in this action were the partners of a business trading under the firm name of Eng Thye Company in unequal shares. They had come to the parting of the ways. The respondent who was the minor partner took an action against the appellant for a declaration that the partnership had been dissolved on a certain date, and at the same time prayed for various injunctions, accounts, the necessary enquiries and for the appointment of a receiver and manager and for ancillary reliefs. There was nothing so far from the statement of claim to indicate that the action was different from the ordinary one in relation to a partnership, following upon the action of one of the partners to seek a dissolution, but as soon as action was commenced the respondent took a series of interlocutory actions that grossly increased the work-load in the action. This is, of course, within the entire competence of the respondent, but in compiling the appeal record, almost every process that had been taken, almost every paper that had been filed and every argument put forward had been included, in chronological order and against all rules for compiling the record, without the slightest attention or consideration being given whether what had been included is or is not relevant to the issue at the appeal. It all makes for an increased difficulty in reading the record and understanding what it is all about.

We have to separate the wheat of the appeal from the chaff and in doing so we find it regretfully necessary to trace in this judgment the course of the proceedings that brought this appeal up, ignoring entirely the other processes.

On September 21, 1976, the respondent as plaintiff took out a summons-in-chambers (pages 39-41 Record) for an account in respect of Eng Thye Company, an enquiry and payment. This summons-in-chambers was heard but no order was drawn up and it would appear that by a proceeding not disclosed, the order in terms that was made was subsequently set aside. We do not know why. However, on March 15, 1977, the respondent took out another summons (pages 205-206 Record), this time for directions, requiring (keeping